IN THE SUPREME COURT OF IOWA

Supreme Court No. 17-0468
Polk County CVCV052231

IOWA DEPARTMENT OF ECONOMIC DEVELOPMENT,
Respondent-Appellant,

vs.

GHOST PLAYER, LLC, and CH INVESTORS, LLC,
Petitioners-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE MICHAEL D. HUPPERT, DISTRICT COURT JUDGE

FINAL BRIEF OF PETITIONER-APPELLEE

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ROUTING STATEMENT

This appeal should be transferred to the Iowa Court of Appeals as it involves the application of existing legal principles and issues appropriate for summary disposition. Iowa R. App. P. 6.1101(2)(f) (2011). Iowa law concerning the finality and review of agency decisions is well settled. See *Walker v. Iowa Dep't of Job Serv.*, 351 N.W.2d 802 (Iowa 1984); see also *Bennett v. MC #619*, 586 N.W.2d 512 (Iowa 1998). Additionally, Iowa law concerning res judicata, and specifically claim preclusion, is also well settled. See *Pavone v. Kirke*, 807 N.W.2d 828 (Iowa 2011); see also *Arnevik v. Univ. of Minn. Bd. of Regents*, 642 N.W.2d 315 (Iowa 2002). The District Court's decision properly applies these well-settled principles in reversing the disputed agency action.

STATEMENT OF THE CASE

The present case is simple; the Appellant-Respondent Iowa Department of Economic Development (the "**Agency**") made a final agency decision in February 2012 regarding tax credits owed to the Appellees-Petitioners Ghost Player, L.L.C. and CH Investors, L.L.C. (collectively "**Ghost Player**"). In May 2016, based only on limited information which was available to them in 2010 prior to their investigation and original final decision, and without giving Ghost Player a meaningful opportunity to

respond to the Agency's allegations of fraud, the Agency collaterally attacked its own final decision unilaterally, declaring all prior awarded tax credits "null and void." The Agency acted upon information that it had possessed for over five years. There is no statute, administrative rule, or other provision of Iowa law that permits any State agency to collaterally attack its own final agency decisions. The Agency's May 2016 decision is beyond any authority delegated to the Agency, is in violation of Iowa law, and is based upon a procedure or decision-making process prohibited by law. This Court should affirm the District Court's reversal of the Agency's May 2016 decision.

STATEMENT OF THE FACTS

Ghost Player initially filed an action for judicial review to recover tax credits from the Agency based on The Film, Television, and Video Project Program ("**Film Program**"). The program, enacted May 17, 2007 and administered by the Agency pursuant to Iowa Administrative Code §261-36, provided film makers and investors the opportunity to apply for tax and investment credits once a film had been accepted and then completed. Ghost Player applied to produce a film project called "Field of Dreams Ghost Players," and the Agency awarded Ghost Player a contract to produce the project under the Film Program. (App. 40-72). The contract between Ghost

Player and the Agency was captioned the Iowa Film, Television and Video Project Promotion Program Contract 08-FILM-030 ("the **Contract**"), and it was executed on January 8, 2009. (App. 40, 52). CH Investors is listed as an investor of the "Field of Dreams Ghost Players" film project and is a third-party beneficiary to the Contract. (App. 62).

Under the Contract, Ghost Player is entitled to receive tax credits totaling twenty-five percent (25%) of Ghost Player's qualified expenditures on the film project, and CH Investors is entitled to tax credits totaling twenty-five percent (25%) of its qualified investments to the film project. (App. 43-45). In May 2010 Ghost Player applied for tax credits pursuant to the Contract, Iowa Code §15.393, and Iowa Administrative Code §26.1-36. (App. 161-162). The application was accompanied by supporting documentation for the respective credits. (App. 214-781).

After a review of the documentation, the Agency made an initial tax credit determination on December 20, 2010, awarding Ghost Player $61,613.92 for its expenditures and CH Investors $5,362.31 for its investment. (App. 788). The Agency indicated that any objection to this determination should be made in writing, and should include any additional documentation for the Agency to consider. (App. 788). Ghost Player submitted additional documentation, and on June 29, 2011, the Agency

revised its award to $59,991.85. (App. 851). Once again, Ghost Player objected and provided more documentation. (App. 852-853). On February 22, 2012, the Agency made its "final" determination, and entered a final agency action awarding Ghost Player $59,991.85 in tax credits for expenditures but refusing to award CH Investors any credits for its investment. (App. 854). The Agency ***never*** challenged Ghost Player's compliance with all statutory and contractual requirements during its ***twenty-one month review*** of Ghost Player's submission, and ***never*** brought any claims of fraud to Ghost Player's attention during that review, despite rejecting several of Ghost Player's claimed qualified expenditures for a variety of other reasons. (App. 854; 788-841).

Ghost Player disagreed with the amount of tax credits awarded by the Agency and so pursued a breach of contract action in the Iowa District Court against the Agency to obtain the remainder of the tax credits. (App. 7-10). The District Court action was dismissed, and on appeal the Supreme Court held the proper venue to challenge any award was an administrative appeal. *Ghost Player, L.L.C. v. State*, 860 N.W.2d 323 (Iowa 2015). Ghost Player sought a contested case hearing, which was denied. (App. 855). The denial specifically insisted that the February 22, 2012 decision was the "final agency action" and invited Ghost Player to file a petition for judicial review

to seek redress. (App. 855). Petitioners filed a petition for judicial review, which has been stayed pending the resolution of this matter. (App. 993).

In January 2016, nearly four years after the "final agency action," the Agency sent two different "Notices" regarding the tax credits previously awarded. (App. 955-958). In the notices, the Agency claimed that Ghost Player was in default under the original contract based on alleged fraudulent misrepresentations[1] in its submission to the Agency requesting tax credits under the Film Program, and requested that Ghost Player submit additional documentation. (App. 955-958). Effectively, the Agency sought to unilaterally modify and/or vacate its own final agency determination regarding the appropriate number of tax credits to award the Agency under the Contract, without citing any court order or other legal authority. (App.

[1] The Agency devotes much of its Statement of Facts speaking to the merits of the Agency's alleged fraudulent misrepresentation, and goes on to allege that Ghost Player "has not even bothered deny submitting false documents." (Appellant's Proof Brief p. 14-19; 31). Tempting though it may be to respond in kind and turn this appeal into a trial of the merits of the Agency's allegations, Ghost Player will decline to do so, and instead will focus on the legal issues at hand. Suffice it to say that Ghost Player and CH Investors have always and will always continue to deny the veracity of the Agency's claims of fraud. In fact, Ghost Player specifically refuted the claims in a letter sent one month after receiving the initial "Notices of Default." See App. 894-901. Included with this letter was documentation supporting Ghost Player's response. See App. 902-954. After submitting this letter, Ghost Player ceased reminding the Agency of its factual defenses against the fraud claims only because of clear legal authority (cited within this brief) which prevents the Agency from taking its purported action.

955-958). The Agency also sought to stay the pending judicial review while it sought to illegally alter its 2012 final agency action. (App. 993-995).

Prior to the Agency reaching its "final decision" in this dispute, Ghost Player advised the Agency on four separate occasions that the Agency lacked legal authority to unilaterally modify or vacate its 2012 final agency decision. First, Ghost Player responded to the notices on February 19, 2016 by indicating that the Agency failed to cite any legal authority allowing it to review its own final agency decision. (App. 894-901). The Agency's motion to stay the pending judicial review proceedings was granted on March 30, 2016. (App. 27-28). Thereafter, Ghost Player filed a Motion to Reconsider and for Injunctive Relief on April 4, 2016, setting forth specific legal authority showing that the Agency lacked statutory authority to take further action after making a final agency decision. (App. 11-16).

The Agency then referred the matter to the Department of Inspections and Appeals ("**DIA**") for a contested case hearing, which Ghost Player moved to dismiss on April 12, 2016. (App. 884-885). The Agency voluntarily withdrew its DIA action, but indicated that it would proceed to take agency action on its own. (App. 867-868). Finally, the Agency sent Ghost Player a letter on April 14, 2016 indicating that it intended to proceed and make a new second "final agency decision" as soon as practicable after

April 29, 2016. (App. 886). Ghost Player responded one final time on April 21, 2016, once again explaining that the Agency lacked legal authority to take its suggested action. (App. 885, 887).

Despite the foregoing, the Agency issued a second "final agency decision" on May 26, 2016, which purported to find Ghost Player in default of the Contract and revoke the prior issued tax credits. (App. 101-120). Ghost Player challenged the legality of the Agency's actions in sending both "Notices of Default" and in reaching the Agency's "final agency decision" in this judicial review proceeding. (App. 17-22). Upon Ghost Player's petition for judicial review, the District Court reversed the Agency's May 26, 2016 decision. (App. 991).

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE AGENCY LACKED LEGAL AUTHORITY TO MAKE ITS MAY 26, 2016 DECISION.

A. Preservation of Error.

Ghost Player agrees that the Agency properly preserved error on this issue.

B. Standard of Review.

The appellate court applies the same standards set forth in the statute governing judicial review of agency decisions when reviewing the District

Court's decision on a petition for judicial review. *Burton v. Hilltop Care Ctr*, 813 N.W.2d 250, 255-256 (Iowa 2012). Iowa Code section 17A.19 governs judicial review of administrative agency decisions. Iowa Code § 17A.19; *Dico, Inc. v. Iowa Employment Appeal Bd.*, 576 N.W.2d 352, 354 (Iowa 1998). "The district court may grant relief if the agency action has prejudiced the substantial rights of the petitioner and if the agency action meets one of the enumerated criteria contained in section 17A.19(10)(*a*) through (*n)*." *Renda v. Iowa Civ. Rights Comm'n*, 784 N.W.2d 8, 11 (Iowa 2010). Ghost Player challenge the Agency's actions on the following grounds:

a. The agency action is beyond the authority delegated to the agency by any provision of law or in violation of any provision of law. Iowa Code § 17A.19(10)(b).
b. The agency action is based upon a procedure or decision-making process prohibited by law. Iowa Code § 17A.19(10)(d).

Pursuant to Iowa Code section 17A.19(11), the Court shall give appropriate deference to the Agency only with respect to matters that have been vested in the discretion of the Agency; the Court shall not give deference to the Agency with respect to whether particular matters have been vested by a provision of law in the discretion of the Agency.

Finally, if this Court determines the Agency made a legal error, the Court has an obligation to correct it. *Van Meter Indus. v. Mason City Human Rights Comm'n*, 675 N.W.2d 503, 506 (Iowa 2004) (citing *Henkel Corp. v. Iowa Civil Rights Comm'n*, 471 N.W.2d 806, 809 (Iowa 1991). "The court shall reverse, modify, or grant any other appropriate relief from the agency action if substantial rights of the petitioner have been prejudiced because of such action." *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 627 (Iowa 2000).

C. The Agency's May 26, 2016 Action is an Improper Collateral Attack on its Own February 22, 2012 Final Agency Action.

As a matter of Iowa law and as a matter of the law of this case, the Agency's February 22, 2012 decision constituted "final" agency action, and required Ghost Player to seek judicial review of the decision through Iowa Code Chapter 17A. *Ghost Player*, 860 N.W.2d at 329. Under Iowa law, when an agency decision becomes final, the agency is without legal authority to engage in any subsequent review of the decision. *Des Moines Police Dep't v. Iowa Civ. Rights Comm'n*, 343 N.W.2d 836, 839 (Iowa 1984). Like a district court judgment, a final agency decision is not subject to collateral attack in a subsequent matter. *Walker v. Iowa Dep't of Job Serv.*, 351 N.W.2d 802, 805 (Iowa 1984); See also *Bennett v. MC #619*, 586 N.W.2d 512, 517-18 (Iowa 1998) (citing *Toomer v. Iowa Dep't of Job*

Service, 340 N.W.2d 594, 598 (Iowa 1983)(concluding that litigants were prevented from collaterally attacking a final agency decision on the grounds of claim preclusion)). In fact, an agency has no statutory or legal authority to unilaterally enforce its own final order or final agency decision, let alone to unilaterally modify or vacate it. See, *DMPD*, 343 N.W.2d at 839; *State ex rel. Iowa Dept. of Nat. Res. v. Shelley*, 512 N.W.2d 579, 580 (Iowa Ct. App. 1993).

The Agency did not have authority in May 2016 to unilaterally revoke its February 2012 final agency action, without resorting to or replying upon judicial review procedures in Iowa Code §17A.19. See *DMPD*, 343 N.W.2d at 839. To do so would be analogous to a district court entering a final judgment, and then vacating the judgment, sua sponte. Once a district court's judgment is final, the district court does not have legal authority to alter, vacate or modify the final judgment unless one of six grounds enumerated in Iowa Rule of Civil Procedure 1.1012 exist. See, *Osthus v. Russell*, 2016 Iowa App. LEXIS 734 (Iowa Ct. App. 2016) (reversing a district court order vacating a portion of a final judgment where the district court found none of the enumerated grounds listed in Iowa R. Civ. P. 1.1012 were applicable to the case). The same is true here; once an agency has made a final determination or taken final action, it lacks statutory authority

to proceed with any subsequent review of its decision, and therefore lacks authority to modify or vacate its final agency action. See *DMPD*, 343 N.W.2d at 839; *Shelley*, 512 N.W.2d at 580.

The Agency undoubtedly had the authority to initially determine whether Ghost Player was eligible for tax credits and the appropriate amount of tax credits to award to Petitioners – based on Iowa Code Chapter 15.393, Iowa Administrative Code 261-36, and the contract between Ghost Player and the Agency. However, that authority cannot and does not extend indefinitely. See *DMPD*, 343 N.W.2d at 839. The District Court correctly concluded that the Agency made the final decision to award Ghost Player some tax credits in February 2012. (App. 987). Neither Ghost Player nor the Agency ever instituted any timely judicial review proceedings to challenge the underlying decision to award tax credits in the abstract. (App. 987). As such, that underlying decision is final, and cannot be collaterally or unilaterally attacked by the Agency. See *Walker*, 351 N.W.2d at 805-06 (holding that claimant could not challenge the underlying basis for disqualification of unemployment benefits after failing to timely appeal said decision after receiving notice of overpayment of unemployment benefits); see also *Toomer*, 340 N.W. 2d at 598 (holding that a party cannot initiate a

rulemaking proceeding to invalidate an agency rule for the sole purpose of overturning a prior agency decision based on that rule).

Here, the District Court correctly determined that the Agency's May 2016 attempt to overturn its February 2012 decision to award Ghost Player tax credits in the abstract is clearly prohibited by *Walker*, *Toomer*, and their progeny. The Agency lacks any statutory or other legal authority to unilaterally and collaterally attack its February 2012 final agency decision four years after the fact. As such, its May 2016 decision goes beyond any authority delegated to the Agency and is based upon a procedure prohibited by law. Iowa Code §17A.19(10)(b); Iowa Code §17A.19(10)(d). The District Court's decision reversing the Agency's May 26, 2016 decision should be affirmed.

II. THE DISTRICT COURT PROPERLY APPLIED THE PRINCIPLES OF RES JUDICATA AND CLAIM PRECLUSION.

A. Preservation of Error.

Ghost Player agrees that the Agency properly preserved error on this issue.

B. Standard of Review.

The standard of review is the same as articulated in section I(B) above.

C. Res Judicata, and Specifically Claim Preclusion, Invalidates the Agency's May 26, 2016 Decision.

Res judicata is a general term that includes both claim preclusion and issue preclusion. *Bennett*, 586 N.W.2d at 516. Claim preclusion exists to prevent a claim from being tried piecemeal. *Bennett*, 586 N.W.2d at 516-517. Therefore, parties ***must*** try all issues within a claim at one time, rather than through separate actions. *Bennett*, 586 N.W.2d at 517 (emphasis added). "An adjudication in a prior action between the same parties on the same claim is *final* as to all issues that could have been presented to the court for determination." *Id*. This doctrine prevents the same parties to a claim from getting a second bite at the apple by simply alleging a new theory on that claim in a separate action. *Id*. To prove claim preclusion, Ghost Player need only show three basic elements: (1) the first and second actions involved the same parties in privity, (2) there was a final judgment in the first action, and (3) the claim in the second action could have been adjudicated in the first action. *Id*. at 516.

Importantly, claim preclusion can preclude further review or litigation on matters that were never addressed in the first proceeding. *Pavone v. Kirke*, 807 N.W.2d 828, 835 (Iowa 2011); see also *Arnevik v. Univ. of Minn. Bd. of Regents*, 642 N.W.2d 315, 319 (Iowa 2002). So long as both parties had a "full and fair opportunity" to present issues in the first proceeding that they attempt to raise in subsequent proceedings or review, then claim

preclusion will bar those issues that were not raised in the first proceeding. *Pavone*, 807 N.W.2d at 836; *Arnevik*, 642 N.W.2d at 319.

Here, all three basic elements of claim preclusion are satisfied, and the Agency's February 2012 final agency action precludes the Agency's attempt at rendering new agency action on the same subject matter in May 2016. The parties to the February 2012 decision and May 2016 decision are undoubtedly the same. The February 2012 decision constitutes final agency action, both by the Agency's own admission and as a matter of law. The issues before the Agency were the same in both actions: 1) whether Ghost Player complied with certain requirements to be eligible for tax credits under the contract and Film Project, and 2) how many tax credits should be awarded to Ghost Player under the contract and Film Projects.

As the Agency notes in its own brief, its allegations of fraudulent misrepresentation against Ghost Player could have prevented Ghost Player from qualifying for any tax credits whatsoever. See Appellant's Proof Brief, p. 29. However, the Agency did not raise Ghost Player's alleged fraudulent misrepresentation in February 2012, and therefore argues that res judicata does not bar it from raising the issue now. Essentially, the Agency argues that it should be permitted a second bite at the apple because it did not raise an issue which should have been raised in February 2012. The doctrine of

claim preclusion is designed to prevent this precise litigation tactic - an artificial separation of claims. *Bennett*, 586 N.W.2d at 516-517. The Agency was provided the allegedly fraudulent documentation in May 2010 and took nearly two years auditing it before reaching its final decision in February 2012. (App. 161-162, 575-595, 854). The Agency had ample time to "discover" and raise the alleged misrepresentation before rendering a final agency decision in February 2012; in fact, the law required the Agency to do so. *Id*. The Agency's attempt to raise this issue now is four years too late, and plainly barred by the doctrine of claim preclusion. *Id*.

III. THE AGENCY FAILED TO PRESERVE ERROR REGARDING THE SCHEME OF REMEDIES EXCEPTION.

The Agency failed to preserve error regarding the scheme of remedies exception. There is no mention of the exception anywhere in the Agency's briefing before the District Court below, nor did the Agency argue the application of the exception in oral argument during the hearing on Ghost Player's petition for judicial review. "Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us that was not first sung in trial court." *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999). The error preservation rule requires parties to alert the district court "to an issue at a time when corrective action can be taken." *Top of Iowa Co-op. v. Sime Farms, Inc.*, 608 N.W.2d 454, 470 (Iowa 2000). Issues

not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal. *State v. Wages*, 483 N.W.2d 325, 326 (Iowa 1992). An argument not made before the district court is waived. *State v. Ochoa*, 792 NW 2d 260, 291 (Iowa 2010) (citing *State v. Evans*, 671 N.W.2d 720, 724 (Iowa 2003). Here, because the Agency failed to raise the applicability of this exception in any way, it is waived.

CONCLUSION

The District Court appropriately determined that the Agency's May 26, 2016 decision was an improper collateral attack on its February 22, 2012 decision, and is barred by clear Iowa authority. Additionally, the District Court properly applied the doctrine of res judicata in concluding that claim preclusion bars the Agency's May 26, 2016 decision. The District Court's ruling reversing the Agency's May 26, 2016 decision should be affirmed by this Court.

REQUEST FOR ORAL SUBMISSION

Appellees Ghost Player, L.L.C. and CH Investors, L.L.C. respectfully request the opportunity to be heard in oral argument on the submission of this appeal.

Respectfully submitted,
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CERTIFICATE OF COST

Pursuant to Iowa Rule of Appellate Procedure 6.903(2)(j), the undersigned attorney hereby certifies that the actual cost for producing the requisite copies of the foregoing document was $0.00.

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CERTIFICATE OF SERVICE

Pursuant to Iowa Rules of Appellate Procedure 6.701 and 6.901, the undersigned hereby certifies that on this 7th day of August, 2017, this document was served upon all parties to this appeal by filing the document electronically via EDMS, pursuant to Rule 16.1220.

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CERTIFICATE OF FILING

Pursuant to Iowa Rules of Appellate Procedure 6.701 and 6.901, the undersigned hereby certifies that on the 7th day of August, 2017, this document was filed with the Iowa Supreme Court by filing it electronically through EDMS.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 3,731 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) (table of contents, table of authorities, statement of the issues, and certificates).

2. This brief complies with the typeface requirements of Iowa. R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman, size 14 point font, in plain style except for case names and emphasis.

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